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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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BHARATIYA NYAYA SANHITA FALLS SHORT: NO JUSTICE FOR MARITAL RAPE VICTIMS

AUTHORED BY - MR. SANTOSH SATI¹

ABSTRACT:

Rape is considered the most heinous crime against women. According to Section 63 of the Bharatiya Nyaya Sanhita, 2023 (BNS), rape is defined as an act committed against a woman without her consent. Therefore, the primary factor for sentencing the accused in rape cases is the absence of consent. What about the issue of marital rape, which remains a hidden problem in Indian households? It has not been made a criminal offense and is not explicitly addressed in any laws or statutes, including the Bharatiya Nyaya Sanhita (BNS). The BNS only considers sexual intercourse by a man with his wife as an offense if the wife is below 18 years of age. However, what about the protection of other categories of married women? Does that constitute a breach of the basic rights? Why is marital rape still considered a taboo? The explanation, as stated by academics, is based on the belief that a husband cannot be held responsible for raping his legal wife. This is because it is argued that a woman has consented to sexual relations via the marital contract and so cannot withdraw her assent (referred to as Sir Matthew Hale's consent thesis). They often reference cultural and customary values, community standards, and the sacredness of marriage as justifications for keeping marital rape legally non-punishable. They argue that making marital rape illegal might possibly destabilize the foundation of marriage, violate private rights, and lead to a complex legal situation inside the family structure. The article is on the historical context of making marital rape a criminal offense. It discusses India's efforts in criminalizing marital rape and how BNS falls short of the expectations, it also examines the global viewpoint on this issue by citing instances from nations that have already criminalized it. The text delves into the experiences of many countries, analyzing the influence of legislative changes on public views, survivors' ability to seek justice, and the overall occurrence of marital rape.

¹ Assistant Professor, IMS Law College, Noida; email-santosh.sati@imsnoida.com

Introduction

According to data released in 2022 by the National Crime Reports Bureau (NCRB), there are approx. 90 new cases of rape reported daily, making it one of the most heinous crimes against women. Rape, as defined under Section 63 of the newly introduced Bharatiya Nyaya Sanhita, 2023 (hereinafter referred as BNS) refers to any sexual intercourse between a man and a woman without her consent. Despite its evident significance, this newly introduced legislation notably does not encompass marital rape. Marital rape refers to any sexual act carried out by one spouse against the other without the victim's permission, occurring inside the confines of a marriage. Marital rape is a kind of sexual abuse and domestic violence.

Although sexual intercourse inside marriage was once seen as a marital prerogative, several nations now classify engaging in sexual activity outside of marriage as rape and are taking strict measures to combat this offense. Conversely, several traditional cultural groups refuse to accept it.

This paper aims to elucidate how the BNS failed to incorporate the concept of marital rape and instead retained the legacy of colonial era law when it comes to marital rape. The analysis also takes a worldwide perspective, investigating the approaches taken by countries that have made marital rape illegal. By examining different nations, we may gain a deeper understanding of how legislative changes as expected from the BNS might have impacted the prevalence of marital rape, the capacity of survivors to seek justice, and the public's opinion of this crime.

HISTORICAL BACKGROUND:

Traditionally, rape was mostly seen as a violation of property rather than an offense against an individual. In ancient civilizations, rape was mostly seen as a violation of a father's or spouse's property rights, rather than as a violation of a woman's right to physical independence or consent. Due to the prevailing notion that a woman is seen as the possession of her husband, the husband is exempt from being prosecuted for the crime of rape.

The concept of marital exemption to rape is credited to Sir Matthew Hale, former chief justice of the Court of King's Bench in England and a prominent English jurist of the seventeenth century. Hale argued that a husband cannot be held responsible for committing rape against his

own spouse².

The legal wife has willingly surrendered herself to her husband by their mutual marriage consent and contract, and she cannot retract this decision. The inference was that after a couple is married, the husband would no longer be prosecuted for raping his wife³.

Religious perspective on marital rape:

Hindu Law:

The Hindu religion does not recognize or accept the occurrence of rape inside the institution of marriage. In Hinduism, women are highly esteemed and regarded as "Goddess Laxmi," while men are entrusted with the duty of ensuring them happiness and safety. Without a doubt, if she is miserable, the family will inevitably collapse. Women are confined to higher pedestals, and the Hindu religion specifically bestows punishment for the act of rape and engaging in illegal relationships. It lacks any inclination to intrude into individuals' personal affairs⁴.

Islamic Law:

In Islam, sexual encounters within a marriage are generally considered permitted, whereas those occurring beyond of a wedding are considered banned (haram). Although sexual contacts inside a marriage are typically seen permissible, will be considered unlawful During the holy month of Ramadan or when a woman is pregnant. So, we can say that the concept of marital rape is a unheard concept in Islam⁵.

Christian Law:

The concept of rape inside the wedlock is not specifically addressed in Christianity; instead, it focuses on the institution of marriage and the associated responsibilities. The Bible states that neither the woman nor the husband has complete power over their own bodies; rather, they are both subject to one another. Furthermore, it states that both parties shall not strip each other without mutual consent. During a certain duration, if a couple fails to unite, they may be

² SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN (Professional Books Limited, P.R. Glazebrook ed., 1971)

³ Anderson, Michelle J. (2016). "Marital Rape Laws Globally". pp. 177–186

⁴ NewIndianXpress (no date) Religion and marital rape, a tricky territory, The New Indian Express. Available <https://www.newindianexpress.com/cities/delhi/2022/feb/14/religionand-marital-rape-a-tricky-territory-2419141.html#:~:text=The%20seer%20says%20that%20Garuda,what%20happens%20within%20a%20family>

⁵ Islamic perspective on marital rape - leading & Enlightening Journal Umy. Available at: <https://journal.umy.ac.id/index.php/jmh/article/download/271/234>.

tempted by Satan to lose their ability to restrain themselves. The Bible advises that both partners should fulfill their marital obligations⁶.

MARITAL RAPE CRIMINALISATION IN OTHER NATION STATES

Position in United Kingdom:

In England, Sir Matthew Hale proposed a broad notion that husbands are not legally responsible for engaging in sexual intercourse with their wives. This is based on the belief that once a woman gives her consent to intercourse at marriage, she cannot withdraw it⁷ but in the case of *R v Clarke* (1949)⁸, the wife successfully secured a judicial separation order. However, she experienced sexual harassment during this time, which was brought to the attention of the court. It has been determined that the individual is being accused of committing rape. In case of *R v. Steele* (1976)⁹, the woman decided to leave her husband and seek refuge at a nurses' home because to significant problems in their marriage. However, the husband unlawfully entered the house and subjected her to harassment without her consent. In this case, the court supported the hale argument. In 1991, the case of *R v R*¹⁰ radically transformed the landscape by enacting legislation that recognizes marital rape as a legally actionable offense. In this particular instance, an individual (referred to as "R") was found guilty of trying to sexually assault his spouse, and he contested the verdict by using the marital rape exception. Following many appeals, the House of Lords conducted a review of the case. The members of the House of Lords unanimously agreed to reverse the common-law ruling and affirm the man's conviction for rape. At present being in a matrimonial relationship does not exclude an individual from being held accountable for committing a sexual crime on her wife as defined by the Sexual Offences Act of 2003.

Position in United States:

In the case of *Commonwealth v. Forgerty*¹¹ in the United States, the court ruled that a husband cannot be charged with rape against his wife. The court also determined that the husband may utilize the institution of marriage as a defense. Prior to the 1970s, conjugal rape was not

⁶ Marital rape: A blatant attack on Christian principles (2014) News | Jamaica Gleaner. Available at: <https://jamaica-gleaner.com/article/news/20141110/marital-rape-blatant-attack-christian-principles-0>.

⁷ KD GAUR (2020) 'sexual offence in marriage under english law', in INDIAN PENAL CODE. 7th edn. gurgaon, haryana: LexisNexis, p. 1107

⁸ *R v Clarke* - [1949] 2 All ER 448

⁹ *Regina v Steele*: CACD 1976

¹⁰ *R v R* [1991] UKHL 12

¹¹ 419 Mass. 456 (Mass. 1995)

considered a criminal offense in the United States, similar to the legal approach in the United Kingdom where Hale's theory was applied.

However, in the late 1970s, the feminist movement initiated the criminalization of marital rape in all 50 states. The landmark case of *Oregon V Rideout* (1978)¹² marked the first prosecution for marital rape, although the husband was ultimately acquitted. Subsequently, in *Commonwealth V James.K. Chretien* (1979)¹³, the first conviction for marital rape occurred. This led to the implementation of three different approaches to address marital rape: removing it without any additional language, clarifying that marriage is not a defense for rape, and introducing a separate offense known as spousal rape. In 1976, the state of Nebraska became the first of all fifty states to make marital rape a criminal offense.

Position in Canada:

Section 271 and 278 of the Canadian Criminal Code include information on sexual assault and the conviction of a spouse for sexual assault. Prior to 1983, marital rape was not considered a criminal offense in Canada. During the 1970s and 1980s, a feminist movement emerged with the goal of repealing these restrictions. Women demanded several measures to enhance the legal protection against sexual offenses, including the establishment of marital immunity, the requirement of confirmation and a recent complaint, safeguards against questioning about their sexual past and reputation, and a stronger reaction to sexual assault against women.

Position in France:

The legislation criminalizes rape, including within marital relationships, as well as domestic abuse, and the authorities consistently and efficiently implement the law. In 1990, the Court of Cassation granted permission for the prosecution of spouses in cases of rape or sexual abuse. Marital rape was made illegal in 1994 via legislation 94-89. Additionally, a second legislation was approved on April 4, 2006, which considers rape by a spouse as an aggravating factor in the prosecution of rape cases.

RAPE LAW IN INDIA

The first case that was brought in is the *Tukuram V State Of Maharashtra* case, also known as the Mathura rape case, a girl was raped by police officers. The Supreme Court ruled that it was

¹² *State v. Rideout*, 303 Or. App. 504 (Or. Ct. App. 2020)

¹³ 383 Mass. 123

not considered rape because she did not ask for help and it was done with her "consent". The court also suggested that she was accustomed to engaging in sexual activity and may have provoked the police officers. This case sparked criticism for the mistreatment of rape victims, leading to the addition of sections 376 (a) to (d) and a shift in the burden of proof from the victim to the accused. Additionally, section 114(A) was added to the Indian Evidence Act. Following this, the infamous Delhi rape case, also known as the Nirbhaya rape case, occurred. In 2013, the Justice VS Verma committee introduced the Criminal Amendment Act 2013, which expanded the definition of rape. The committee also recommended the whole and full criminalization of marital rape, emphasizing that it violates the right to life.

In India, the act of marital rape is not recognized as a criminal offense. The Protection of Women from Domestic Abuse legislation, 2005 was passed by the Parliament of India with the aim of enhancing the safeguarding of women's rights as provided by the Constitution. The legislation specifically targets women who are subjected to any kind of abuse inside their household and other connected situations. However, it failed to include Marital Rape under its jurisdiction. The United Nations Population Fund has reported that approximately 736 million women worldwide, which is nearly one-third of all women aged 15 and older, have experienced physical and/or intimate partner violence, sexual assault another person, or both, at least once in their lifetime. The 172nd law commission report proposes the invalidation of the exemption provided in section 375 of the Indian Penal Code (IPC). It suggests that being the spouse of the victim should not be considered as a mitigating circumstance recognized by the law.

The 17th Justice VS Verma committee brought about a substantial amendment in the Criminal Act of 2013. They also proposed the criminalization of marital rape as an offense. They advised that marriage should not be considered a determining element for granting permission, and the connection between the individuals should not be considered a mitigating factor.

The Indian Penal Code (IPC) does not explicitly disregard the concept of marital rape, but it indirectly addresses it. The IPC states that if a wife is above 15 years old, it will not be considered rape. This creates a distinction between married and unmarried girls who are below 15-18 years old. However, other statutes such as the Prohibition of Child Marriage Act, 2006; the Protection of Children from Sexual Offenses Act, 2012; and the Juvenile Justice Act, 2015, define a "child" as someone below 18 years old. It is worth considering why the age of consent for sexual intercourse cannot be set at 18. As a result, in the case of Independent Thought v.

Union of India, the age was increased from 15 to 18. In the case of *Hrishikesh Sahoo v. State of Karnataka*, Justice M Nagaprasanna ruled that in certain specific circumstances, when a husband commits rape against his wife, he cannot invoke the exception outlined in Section 375 of the Indian Penal Code (IPC). This is because the exemption provided by the law is not absolute. The court ruled that no legal exception may be so unrestricted that it permits the conduct of crimes against society. According to the court, regardless of the relationship between the individuals involved, rape is defined as a male performing a non-consensual sexual act on a woman. If an action is punished for a man, it ought to be punishable for a man, even if that guy is a spouse. The number is 20.

The ruling has been temporarily halted, and the High Court of Karnataka has submitted an affidavit affirming the correctness of the judgment. Additionally, the court has issued the suggestion of the Justice Verma Committee, which states that a marital or other link between the offender and victim should not be considered.

JUDICIAL STANCE ON MARITAL RAPE:

Following a notable adjustment in the legal age for granting consent, there have been rulings that strengthen the criminalization of marital rape. One such ruling is the case of *RIT Foundation v Union of India*¹⁴, where Justice Rajiv Shakti held that marital exemption is a violation of Article 14, 15, 19(1)(a), and 21. However, Justice Hari Shankar expressed a contradictory conclusion, arguing that it was not unlawful.

The case of *X vs Principal Secretary, Health and Family Welfare Department, Govt of NCT Of Delhi*¹⁵, included the inclusion of the terms "sexual assault" or "rape" in rule 3B(a) of the MTP Act. This regulation pertains to a husband's act of sexual assault or rape performed on his wife. These two judgments have provided hope for the criminalization of marital rape.

In the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*¹⁶, the court ruled that married women are not allowed to file charges of rape against their legal husbands. However, the court emphasized that it is now necessary to include the idea of "implied consent" into the institution of marriage. The law must prioritize and protect the rights of physical autonomy and integrity

¹⁴ 2022 SCC OnLine Del 1404

¹⁵ (Civil) No 12612 of 2022

¹⁶ Saba, (Apr. 18, 2018)

for all women regardless of her marital status.

The case of Jaideep Bhanushankar Verma vs the Union of India. In this instance, the Gujarat High Court has said that it is now crucial for a writ court to ascertain if Exception-2 to Section 375 of the Indian Penal Code may be considered obviously arbitrary and whether it infringes upon a woman's basic right to sexual autonomy.

The writ petition argued that the exception allowing a husband to have sexual intercourse with his wife without her consent is based on the doctrine of Coverture, which states that upon marriage, a woman loses her separate existence and is regarded as the property of her husband. The petition further argued that this exception violates Articles 14, 15, 19, and 21 of the constitution, as well as the right to live with dignity, the right to personal liberty, the right to sexual autonomy and bodily integrity, and the right to reproductive choices. The high court has sent a notice to the attorney general of India and the government of Gujarat.

The criminalization of marital rape has not only been influenced by previous cases, but also by the introduction of a bill by Shashi Tharoor. This bill, titled the Women's Sexual, Reproductive and Menstrual Rights Bill 2018, recommends the removal of exception 2 in section 375 and adds a proviso to explanation 2. "The consent of a woman to engage in sexual activity should not be assumed based on factors such as her ethnicity, religion, caste, education, profession, clothing preference, entertainment preference, social circle, personal opinion, past sexual conduct, or any other related grounds".

OBSTACLES WITH MARITAL RAPE:

Rape should be recognized as rape irrespective of the relationship involved. The primary reason for not making marital rape a criminal offense is the system of marriage. In India, marriage is considered a custom, tradition, and sacrament. Former Chief Justice of India, Dipak Mishra, has expressed the view that marital rape should not be considered a crime in India. He believes that criminalizing marital rape would lead to complete chaos within families, and that the stability of our country depends on the foundation of family values. However, this institution has undergone significant change, resulting in several cultural transformations such as the acceptance of live-in relationships, the recognition of the unconstitutionality of Section 377, the legalization of same-sex marriage, and the concept of judicial separation due to irretrievable breakdown. The Supreme Court has granted permission to consider petitions on marital rape.

If criminalization of marital rape is enacted, there will be consequences.

Consent evidence issue: Section 122 of the Indian Evidence Act grants a privilege to married individuals, exempting them from providing evidence related to communications made during their marriage. Another issue concerning evidence is the determination of consent from the wife. There is a gap in understanding how the court will ascertain whether the consent was consensual or non-consensual. In cases involving violence against women, the court often relies on presumptions. For instance, in cases of dowry death, it is presumed that if a woman dies unnaturally within seven years of marriage, it is considered a dowry death. If the presumption of marital rape is established, it is likely that many unfounded instances will be reported by wives.

Unfounded accusations made against the in-laws and husband: There is often a high number of false cases filed by wives against their husbands and in-laws. This is due to the presence of gender biased laws and the absence of gender-neutral laws. The court has acknowledged that there is a trend of filing multiple cases against husbands and in-laws in both family and criminal courts, specifically under the Hindu Marriage Act and the Protection of Women from Domestic Violence Act.

NEWLY INTRODUCED BNS, 2024 AND MARITAL RAPE:

Marital rape is a highly debated subject in India and worldwide. Although some nations have made substantial progress in criminalizing marital rape, India is falling behind in tackling this grave infringement of human rights. The outlawing of marital rape in India has faced several impediments, such as the reverence for marriage as a holy institution, concerns over unfounded allegations, and discussions around the definition and proof of consent. Nevertheless, there is an increasing recognition of personal independence, respect, and fairness that is slowly supplanting conventional male-dominated systems. Although the progress may be sluggish and sometimes faced with opposition, it is crucial to acknowledge marital rape as a criminal act in order to provide justice for survivors and dismantle detrimental patriarchal practices.

Conclusion

As cultures progress, the act of making marital rape illegal shows a dedication to respecting and prioritizing the autonomy, dignity, and well-being of every person. It emphasizes the

concept that consent is an essential entitlement of every individual that must be respected in every situation, especially within the institution of marriage. The punishment of marital rape goes beyond just a legal matter; it signifies a shared declaration of the importance of human rights, equality, and the endeavor for a fair and impartial society.

Regrettably, the recently implemented Bharatiya Nyaya Sanhita, 2023 (BNS) does not effectively tackle the problem of marital rape, thereby dashing any expectations for advancement in this area. It is important to comprehend that criminal law serves the purpose of not only imposing penalties but also establishing society standards by defining what actions are considered morally incorrect. The failure to acknowledge marital rape by the BNS has established an implicit standard that privileges men, implying that marital rape is not morally objectionable. This will have in significant negative consequences for society. Legislators cannot shirk their duties by asserting that society is unprepared or by invoking apprehensions about spurious cases. It is imperative to recognize and confront the injustice of marital rape. It is crucial to acknowledge this infringement in order to safeguard human rights and advance gender equality, eventually resulting in a fairer society.

